INDEX

	Page
Opinions below	1
Jurisdiction	1
Statute and regulations involved	2
Questions presented	2
Statement	2
Argument	9
Conclusion	16
Appendix	17

CITATIONS

Cases:	
Bowles v. *United States*, 319 U. S. 33	10, 14
Falbo v. *United States*, 320 U. S. 549	10, 14
Labor Board v. *Nevada Copper Co.*, 316 U. S. 105	11, 16
Medo Corp. v. *Labor Board*, 321 U. S. 678	11
United States ex rel. Brandon v. *Downer*, 135 F. 2d 521	16
United States ex rel. Phillips v. *Downer*, 139 F. 2d 761	11
United States ex rel. Trainin v. *Cain*, No. 694, Oct. Term, 1944, certiorari denied, 323 U. S. 795	10
Warehouse Co. v. *United States*, 283 U. S. 501	11
Statutes and Regulations:	
Selective Training and Service Act of 1940, as amended, 50 U. S. C. App. 305):	
Section 5	11, 17
Selective Service Regulations:	
Section 622.25–1	11, 17
Section 623.2	14, 19
Section 626.2	20
Section 626.3	20
Section 627.24	21
Section 627.26	21
Miscellaneous:	
Local Board Memorandum No. 164, issued by the National Office of the Selective Service System:	
Part I	22
Part III	24

665756—45——1

In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 251

JOHN H. SWATZKA, PETITIONER

v.

COLONEL MAX W. SULLIVAN, COMMANDING OFFICER, FORT LEWIS, WASHINGTON, AND LIEUTENANT COLONEL DAVID L. FREDENBURG, COMMANDING OFFICER, RECEPTION CENTER, FORT LEWIS, WASHINGTON

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the circuit court of appeals (R. 315–319) is reported at 148 F. 2d 965. The opinion of the district court appears at R. 75–95.

JURISDICTION

The judgment of the circuit court of appeals was entered May 1, 1945 (R. 319), and a petition for rehearing was denied June 12, 1945 (R. 320). The petition for a writ of certiorari was filed

July 23, 1945. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

STATUTE AND REGULATIONS INVOLVED

The pertinent provisions of the Selective Training and Service Act of 1940 and of the Selective Service Regulations are set forth in the Appendix, *infra,* pp. 17–24.

QUESTIONS PRESENTED

1. Whether there was substantial basis for the action of the Selective Service Appeal Board in denying petitioner's son a deferment as an essential farm worker and in classifying him as available for military service.

2. Whether the Selective Service boards departed from the Selective Service Regulations in their consideration of this case.

STATEMENT

Having been classified 1–A (available for military service) (R. 167), John Gale Swatzka was on April 28, 1944, ordered to report for induction on May 13, 1944 (R. 170–171). He reported, and upon his induction his father instituted the present habeas corpus action on his behalf. The petition for the writ (R. 2–10) alleged, in substance, that the local board and the appeal board acted arbitrarily and capriciously in failing to classify John in class II–C, as an essential farm worker

who was irreplaceable. The petition was supported by numerous exhibits (R. 11–65) calculated to show that John was an essential farm worker. An order to show cause issued (R. 65–66) and a return (R. 66–70) was made by respondents, which alleged that petitioner's son was lawfully selected for military service and inducted under the provisions of the Selective Training and Service Act of 1940. Petitioner formally traversed the return (R. 70–71) and a hearing was had.

At the hearing, it was undisputed that petitioner operates a 370-acre farm (R. 249) and that another worker in addition to himself is necessary to maintain production on the farm (R. 227). The principal question at the hearing, and previously in the administrative proceedings, was whether petitioner's son actively participated in production on the farm and whether, if he were drafted, he could be replaced. The evidence in this respect, as shown by the registrant's Selective Service file and the testimony at the hearing, may be briefly summarized as follows:

Petitioner's son registered with his local Selective Service Board in Linn County, Oregon, in December, 1943, on his eighteenth birthday (R. 181). In the Selective Service questionnaire which he filed with the Board (Ex. A1–1, R. 125–129) he stated, *inter alia,* that he had graduated from high school and had completed eleven weeks

of a pre-medical course at the University of Oregon; that his "present occupation" was that of a "general farmer working with my father"; and that he had performed this work, as an unpaid family worker, "all the time I was not in school." He also filed an occupational questionnaire (Ex. A1–2, R. 130–131) and a special questionnaire for farm workers (Ex. A1–3, R. 131–140) in which he related in detail the nature of his farming operations. On January 3, 1944, John's classification was considered at a meeting of the local board, at which both petitioner and his son were present. The minutes of the meeting (Ex. A1–4, R. 141), which were prepared in the usual manner by the Chief Clerk of the board and which were approved by the Board Chairman (R. 194–195), recite that:

> John H. Swatzka and son appeared before the Local Board to advance their case.
>
> Mr. Swatzka, parent, is extremely anxious to keep his son out of service. They have an excellent farm enterprise, but the boy has never worked.
>
> Mr. Swatzka, a hired man and Mrs. Swatzka are the producing members of the agricultural units.
>
> Questionnaire not having been returned, Mr. Swatzka advised to send the material he brought with the questionnaire.
>
> A direct question brought the answer that the production had been the work of Mr. Swatzka, parent and a hired man.

Board noted that John Gale Swatzka's hands were fat and smooth, showed no evidence of work.

On January 25, 1944, John underwent a preinduction physical examination and was found fit for general military service (Ex. A1–8, R. 149). Thereafter, on February 7, 1944, the local board again considered John's case and at the request of petitioner the board referred the matter to the County War Board for a recommendation as to John's essentiality to the farm (Ex. A1–9, R. 149–150; R. 189, 281). In accordance with established practice, the County War Board forwarded its recommendation to the local board on selective service forms provided for that purpose. The recommendation stated that John was not "necessary to and responsible for agricultural production sufficient to justify deferment" and that his removal from agriculture would not materially hamper the war effort (Ex. A1–10, R. 150–151; Ex. A1–11, 12, R. 159; see *infra*, p. 7). On February 28, 1944, the local board considered the recommendation of the War Board and, concluding that John was not a factor in the farm's production, it voted unanimously to classify John 1–A (Ex. A1–13, 14, R. 161–162).

On March 6, 1944, the registrant appealed to his Board of Appeal from the classification given him by his local board (R. 129), filing two affidavits in support of the appeal, to the effect that he was essential to the farm (Ex. A1–16, 17,

R. 163–165). While the appeal was pending and after the local board had transmitted the selective service file to State Selective Service Headquarters, the registrant filed with the local board additional information and affidavits[1] (see R. 11–56) and requested that the local board reconsider his case (Ex. A1–22, 23, R. 172–173). In compliance with the registrant's request, the file was returned to the local board for consideration of the newly filed evidence (Ex. A1–25, 26, R. 173–176). On April 4, 1944, the local board notified John that the "information submitted does not warrant reopening of the registrant's classification" (Ex. A1–27, R. 177). Thereafter the selective service file, including the newly filed evidence, was returned to the Board of Appeal for decision of the appeal (R. 236–238). On April 12, 1944, the Board of Appeal voted unanimously to classify petitioner's son 1–A. In respect of this action the minutes of the Board of Appeal state (Ex. A–3, R. 239–240):

> The members of the Board carefully examined the file including all the affidavits submitted by the attorneys employed by the registrant or by the registrant's father to secure deferment. The evidence in the file was given very minute attention owing to the fact that such unusual efforts were being made to have this registrant de-

[1] These materials were to the same effect as John's testimony at the habeas corpus hearing (see *infra*, p. 8).

> ferred. A motion of 1–A was made, vote was taken and it was unanimous, 4 to 0.

It was at this point that John was ordered to report for induction, *supra,* p. 2.

At the habeas corpus hearing, Mr. O. E. Mikesell, the secretary of the Department of Agriculture County War Board and the County Agricultural Agent, testified that the board consisted of representatives of the Department of Agriculture and three local farmers (R. 205–208). One of the functions of the board was to maintain maximum production of essential agricultural products (R. 232) and in this connection it made recommendations to the local selective service board concerning the essentiality of persons claiming deferment from military service as essential farm workers (R. 206). Mikesell testified that in making its recommendation in this case the War Board considered whether John had actively participated in production on the farm and whether at the time he was necessary to the maintenance of the farm's productivity (R. 210–212). The adverse recommendation of the board was based primarily on the fact that during the harvest season in the summer of 1943 John was away from the farm taking a pre-medical course at the University of Oregon and on the fact that, in any event, it appeared that another farm hand could be obtained, if necessary, for other farmers in the locality had been able to secure replacements (R. 223–224, 300–301, 304).

665756—45——2

The evidence adduced by petitioner at the habeas corpus hearing related principally to his farming operations and to the need for his son on the farm. Petitioner's son testified that he grew up on the farm, always working on the farm when he was not in school (R. 248); that until the fall of 1943 his father had a hired man to assist him on the farm, but at that time the hired man left, apparently for higher wages and shorter hours somewhere else (R. 250–251); that he attended the summer session at the University of Oregon in 1943 (R. 251); that he withdrew from college at the completion of the summer term to devote his full time to the farm (R. 253); that his father's health was not good and that his mother was unable to contribute to the farm's production because of ill health (R. 252, 258); that his father had been unable to procure a hired man for the farm since the fall of 1943 (R. 259); and that he and his father were treated "very well, apparently" by the local board when they appeared before it (R. 264). Petitioner's testimony substantiated that of his son (see R. 271–278).

The district court, on the basis of this evidence, entered findings of fact and conclusions of law favorable to petitioner (R. 75–95, 97) and the writ issued (R. 71–73). The court found that certain of the facts shown in the selective service file were untrue (R. 85–87); that "if the registrant in this case had not attended the University of Oregon

summer school in 1943, he doubtless, would have been recommended for a deferment" (R. 82); that petitioner's intense efforts to procure a deferment for his son prejudiced the Selective Service System against the son (R. 82–83); that the County War Board's findings and recommendations were not supported by the facts adduced at the hearing (R. 88–89); and that the issue presented by the case is close enough that it well might be taken to an appellate court (R. 94).

Upon respondents' appeal to the Circuit Court of Appeals for the Ninth Circuit, the judgment of the district court was reversed (R. 315–318, 319). The court below concluded (R. 318) that the trial judge's opinion "indicates that he strongly disagreed with the conclusion of the draft boards, but it was not for him nor is it for us to try the factual issues (1) whether the registrant's services were necessary on his parents' farm, (2) whether registrant was replaceable. The evidence was conflicting and there is no indication that the boards acted other than judicially."

ARGUMENT

1. Petitioner's principal contention (Pet. 18–21, 44–59) appears to be that there is no substantial evidence in support of the selective service boards' refusal to defer his son as an essential farmer. And, in this connection, he urges (Pet. 7–10, 45–53) that there exists a conflict among

the circuit courts of appeals as to the appropriate test for measuring the legality of the selective service action. We are cognizant of the conflict, as we advised the Court in our brief, p. 14, in *United States ex rel. Trainin* v. *Cain,* No. 694, October Term, 1944, certiorari denied, 323 U. S. 795, but we believe that this case, like the *Trainin* case, presents no occasion for resolving it. For, even applying the substantial evidence rule for which petitioner contends, it is plain that his son's classification is not vulnerable.

Since the registrant was finally classified *de novo* by his appeal board (*supra,* p. 6), the propriety of his classification must be tested in the light of the evidence which was before that board. *Bowles* v. *United States,* 319 U. S. 33; Mr. Justice Rutledge concurring in *Falbo* v. *United States,* 320 U. S. 549, 555. It is undisputed that the registrant's entire selective service file was before the Board of Appeal (R. 237–238) and the minutes of the Board of Appeal, which are uncontroverted, recite that the "evidence in the file was given very minute attention" (R. 240), before the board concluded that the registrant was not entitled to deferment as an irreplaceable farmer. Accordingly, it is clear that the only question which petitioner's contention presents is whether there is substantial evidence in the selective service file to support the appeal board's determination. That there is such support for the action

of the appeal board is, in our view, not open to serious question.

Section 5 (k) of the Selective Training and Service Act (*infra,* p. 17), permits the deferment of a person as a farmer only if the selective service boards find him "to be necessary to and regularly engaged in an agricultural occupation or endeavor essential to the war effort" and it provides that the deferment shall be granted until such time as a satisfactory replacement can be obtained. And Section 622.25–1 of the Selective Service Regulations (*infra,* pp. 17–19) requires, in conformity with the Act, that a registrant shall be placed in class II–C only if he is found to be necessary to and regularly engaged in an agricultural occupation or endeavor essential to the war effort and a satisfactory replacement cannot be obtained for him. In determining whether petitioner's son was entitled to such a deferment it was, of course, for the Board of Appeal as the final trier of facts to weigh the evidence and determine issues of credibility. *Warehouse Co.* v. *United States,* 283 U. S. 501, 508; *Labor Board* v. *Nevada Copper Co.,* 316 U. S. 105; *Medo Corp.* v. *Labor Board,* 321 U. S. 678, 681–682; *United States ex rel. Phillips* v. *Downer,* 135 F. 2d 521, 525 (C. C. A. 2).

The evidence in the file supporting the board's determination shows that shortly after petitioner's son registered with the local board, petitioner and

his son were present at a meeting of the board, and that it was ascertained that production on the farm "had been the work of Mr. Swatzka, parent and a hired man." Thereafter petitioner urged the board to secure the recommendation of the County War Board, an agency composed of local farmers and government officials in the agricultural field, whose primary function was to maintain maximum production of necessary farm products. In compliance with the request and, consistently with established selective service practice, the local board referred the case to the County War Board for recommendation. The County War Board was familiar with petitioner's farm and its operations and it recommended to the local board that the registrant be denied a deferment. It was developed at the habeas corpus hearing that its recommendation was predicated on its finding that petitioner's son had not been regularly engaged in work on the farm and that, in any event, a replacement could be found for him. Additionally, the selective service file revealed that during the 1943 harvest season the registrant was attending college as a premedical student. Until the fall of 1943, petitioner managed to have a hired man on the farm, and he left the farm for better wages and working conditions.

We think the recommendation of the County War Board of itself is substantial evidence in support of the appeal board's decision. It is

undisputed that the War Board was composed of farm experts who were thoroughly familiar with local farming conditions, and, in particular, with petitioner's farm. The fact that petitioner urged the local board to secure the recommendation of the County War Board demonstrates the high regard he had for its expertness in dealing with the matter involved. Moreover, its recommendation was shown, at the habeas corpus hearing, to be supported by the fact that the registrant had been a college student until shortly before he registered with his local board and by the War Board's finding that replacements were available in the locality of petitioner's farm. When the other evidence adverse to the registrant is coupled with the County War Board's recommendation, we think it clear that the appeal board acted on the basis of persuasive evidence adverse to the registrant and that it was neither arbitrary nor capricious in denying petitioner's son a deferment as an irreplaceable farmer.[2]

2. Petitioner also assigns several alleged errors which we believe are patently without merit and do not require extensive consideration.

---

[2] As is evident from the foregoing discussion we do not agree with petitioner (Pet. 38–43) that the case presents any problem of construing Section 5 (k) of the Act. Rather, assuming, as petitioner urges, that the boards are obliged to defer a registrant who they find is necessary to and regularly engaged in an agricultural occupation, the question presented by the case is whether the board of appeal arbitrarily or capriciously found that petitioner's son was not such a person.

a. We agree with petitioner (Pet. 59–62) that the Selective Service Regulations (*infra,* p. 19) require that the classification be based on the materials in the registrant's selective service file, but we perceive no basis for complaint on petitioner's part, for there is no showing that this was not done in this case. Indeed, we think it clear from the evidence summarized in the Statement, *supra,* pp. 3–5, that the local board did this. As is required by Section 623.2 (*infra,* p. 19), the local board included in the selective service file all the materials it had concerning the registrant and it inserted in the file the information which was obtained at interviews with petitioner and his son, as well as minutes of meetings in which the registrant's classification was considered. On the basis of the selective service file the board of appeal finally classified the registrant and it is solely on the basis of the information in the file that we have argued, *supra,* pp. 11–13, that the board of appeal's decision is supported by substantial evidence.

b. Whether the local board misconstrued Section 5 (k) of the Act (Pet. 62–63) is wholly immaterial, for, as we have shown, *supra,* pp. 6, 10, the registrant was finally classified by the board of appeal. Petitioner does not suggest that the board of appeal misconstrued the Act. *Bowles* v. *United States,* 319 U. S. 33; concurring opinion, *Falbo* v. *United States,* 320 U. S. 549.

c. Plainly, petitioner is not entitled to complain

(Pet. 63–65) that the local board sought a recommendation from the County War Board in respect of the registrant's claim to deferment, for it was at his instance that this was done (*supra,* p. 5). In any event, the local board was authorized to secure the recommendation of the County War Board by Local Board Memorandum No. 164 issued by the Director of Selective Service (*infra,* p. 24) and there is no question that both the local board and the appeal board were aware of the advisory nature of the County War Board's action (see R. 161, 185–186, 240). Indeed, the minutes of the board of appeal expressly state that in making its decision the board gave "minute attention" to all the evidence in the file (R. 240).

d. Whether the local board abused its discretion (Pet. 65–67) in failing to reopen the registrant's classification after it had received and considered the additional materials which he filed in April 1944 (*supra,* p. 6) is an academic question. For those materials were included in the selective service file and were considered by the board of appeal, which was the final classifying agency. See *supra,* pp. 6–7.

e. Contrary to petitioner's argument (Pet. 70–72), the circuit court of appeals properly reversed the decision of the district court. For, as the court points out in its opinion (R. 318) and as is evident from the opinion of the district court (R. 75–95), the district court undertook to weigh the evidence, and to determine its credibility, a func-

tion which, as we have shown, is reserved exclusively for the administrative agency. The fact that the district court disagreed with the determination of the board of appeal or would have drawn different inferences from the evidence in the selective service file does not mean that the board of appeal erred in its decision or that it acted arbitrarily or capriciously. See *Labor Board* v. *Nevada Copper Co.*, 316 U. S. 105; *United States ex rel. Brandon* v. *Downer*, 139 F. 2d 761, 765 (C. C. A. 2).

CONCLUSION

The sole question of substance in the case is one of weighing the conflicting evidence in the selective service file and of determining its credibility. The board of appeal properly performed this function. In these circumstances no question is presented which requires or merits review by this Court. It is, therefore, respectfully submitted that the petition should be denied.

HAROLD JUDSON,
Acting Solicitor General.
THERON L. CAUDLE,
Assistant Attorney General.
ROBERT S. ERDAHL,
IRVING S. SHAPIRO,
Attorneys.

SEPTEMBER 1945.